

VIA ECF

September 19, 2014

The Honorable Alvin W. Thompson
Abraham Ribicoff Federal Building
United States Courthouse
450 Main Street, Suite 250
Hartford, CT 06103

The Honorable Denise L. Cote
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007

Dear Judge Thompson and Judge Cote:

We write on behalf of RBS¹ in response to FHFA's letter to the Courts, dated September 16, 2014, submitted in the Connecticut Action and the *Nomura* Action (CT Dkt. 468-1; *Nomura* Dkt. 818.) By its letter, FHFA continues to seek to impose ever increasing, unfair, and undue burdens on RBS in support of its belated efforts to take discovery in the *Nomura* Action.

Preliminarily, the issues raised by the letter pertain to the production of documents in the Connecticut Action. It is undisputed that RBS's production in the *Nomura* Action was completed long ago and no issue has ever been raised as to the sufficiency of that production. FHFA's application is properly heard only by Judge Thompson, and RBS renews its objection to FHFA's efforts to bring issues related to the Connecticut Action before Judge Cote and to Judge Cote's involvement in those issues. RBS also objects to FHFA's use of the *Nomura* Action before Judge Cote, in which RBS is a secondary defendant on claims pertaining to four securitizations, to obtain expedited rulings and discovery against RBS in the much larger Connecticut Action while RBS's requests for the significant discovery it needs to defend the Connecticut Action remain delayed and undecided. RBS again requests a hearing before Judge Thompson.

On the merits of FHFA's current application, the application should be denied, as explained below.

On August 29, FHFA noticed depositions of eleven current and former RBS employees. Only three of these witnesses had substantial involvement in the *Nomura* securitizations. Nonetheless, the Courts ordered that RBS must produce on, an expedited basis, nine of the eleven witnesses that FHFA asserts had a role in RBS's due diligence on any securitization in either action. RBS has worked diligently with these deponents and their individual counsel to schedule two-day depositions by October 24, the date by which the Courts ordered the depositions to be completed.²

By orders dated September 5 and 8, (CT Dkt. 443; CT Dkt. 448), Judge Thompson required RBS to produce additional documents in the Connecticut Action³ including documents from the newly-added custodians to the extent those documents were located in the United States, which by joint order, must be produced by October 17. (*See* CT Dkt. 458; *Nomura* Dkt. 813). After those orders were

¹ Unless otherwise indicated, terms used herein have the meanings ascribed in RBS's August 29, 2014 letter. (*See* CT Dkt. 431; *Nomura* Dkt. 788.)

² RBS proposes to present Brian Farrell during the week of October 24 as he is scheduled to be on leave following the birth of his child in late September. FHFA does not object. (*See* CT Dkt. 468 at n.2; *Nomura* Dkt. 818 at n.2.)

³ FHFA's assertion, and Judge Cote's suggestion in her September 8, 2014 order, that RBS has "slow-roll[ed]" or "slow walked" its document production (*Nomura* Dkt. 774; *Nomura* Dkt. 807 at 18) in the Connecticut Action is without basis. (*See* CT Dkt. 431-1.) RBS substantially completed production in the Connecticut Action under the search terms it proposed consistent with its objections to FHFA's requests by the March 22, 2013 date set forth in the Consolidation Order, having produced by that date over 115,000 documents. On March 28, 2014, RBS substantially completed production of documents from 17 additional custodians agreed to in the Connecticut Action in meet-and-confers in the Fall of 2013. On August 22, 2014, RBS substantially completed the production of documents located using post-closing and pejorative search terms as ordered by the Court on May 13, 2014.

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issued and the document production timelines had been set by the Courts, FHFA requested that RBS “propose deposition dates between October 1 and 24, 2014.” (CT Dkt. 468-3; *Nomura* Dkt. 818-2.) Two days later, on September 10, RBS did so (with the exception of Brian Farrell, who (as noted in footnote 2 above) is scheduled to be on paternity leave for most of October). The burden associated with making these witnesses available for two-day depositions in that time period was significant. Five of the nine deponents are former employees who are making themselves available on very short notice. One of the depositions must take place in Los Angeles, where a former employee resides, requiring the travel of RBS’s counsel and the employee’s individual counsel. Several deponents have also made arrangements to be available in New York for the depositions despite the fact that they reside in other cities. In addition, several witnesses share the same individual counsel and, as such, cannot be deposed on the same days. And contrary to the statement in FHFA’s letter to the Courts, RBS’s September 10th proposed schedule did include multiple depositions on the same day, including presenting two witnesses on October 1-2, 9, and 16-17. (*See* CT Dkt. 368-5; *Nomura* Dkt. 818-4.)

Then, on September 12, after RBS had worked with each deponent and their counsel to propose a schedule between October 1 and October 24, FHFA notified RBS that it was unwilling to take any of the nine depositions that had been ordered until October 6 at the earliest. Despite the unreasonableness of FHFA’s changed position, RBS has worked again to accommodate each of FHFA’s requests, and has proposed a schedule that completes seven of the nine depositions by October 24 and the two remaining depositions by October 31.⁴ (*See* Ex. A.) FHFA has not responded to this proposal. FHFA has made its increasingly unreasonable demands by re-arguing the now resolved document production schedule. On September 15, for example, FHFA sought certification that “RBS will prioritize the production of Witness Documents for each noticed deponent and will schedule the noticed deposition such that FHFA receives Witness Documents at least ten days before any scheduled deposition.” (CT Dkt. 468-5; *Nomura* Dkt. 818-4.) FHFA knew from RBS’s submissions that production would require exporting data located at Iron Mountain and that, as such, RBS would not have that data within ten days of the start of depositions. (*See* CT Dkt. 438 at Ex. 2; *Nomura* Dkt. 801.) Similarly, FHFA knew that one of the newly-added custodians was an RBS employee based in the United Kingdom and that, due to United Kingdom data privacy laws related to document retrieval and review, those documents may be delayed or unavailable. (*See id.*) The Courts have recognized these realities and, as a result, RBS has been allowed until October 13 and, with respect to the United Kingdom documents, until October 31, to complete production. (*See* CT Dkt. 450; *Nomura* Dkt. 806.) Notably, FHFA never raised any such purported condition to taking depositions in any of its applications to the Courts or with RBS during the substantial meet-and-confer discussions and argument related to the document production and deposition schedule. To the contrary, FHFA told Judge Cote at the outset of the current motion practice that it was prepared to proceed with depositions without *any* of the recently ordered discovery. (*See Nomura* Dkt. 774.)

The Amended Deposition Protocol, the purported basis for FHFA’s demand, was never intended to deal with the present situation—*i.e.*, where documents have been ordered to be produced simultaneously with the ordered expedited production of witnesses. But even if the Amended Deposition Protocol were to be applied, RBS has satisfied its requirement that it certify, ten days prior to a deposition, that all Witness Documents have been produced or, “[i]f all [Witness Documents] have not been produced . . . provide a good faith estimate of the volume of Witness Documents remaining to be

⁴ RBS offered FHFA the option of taking the deposition of Frank Skibo on October 1-2, as initially proposed, or on October 29-30. If depositions are not conducted during the first week of October, it would be necessary to move Mr. Skibo’s deposition to this later date to facilitate the schedules of witnesses and their counsel, as Mr. Skibo has the same individual counsel as two of the other eight witnesses, Adam Smith and William Gallagher.

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reviewed and/or produced, and the estimated time to review and/or produce such remaining Witness Documents.” (CT Dkt. 141-1 at § II.E.) Based on the data currently available, RBS estimated the Witness Documents that will be produced for each custodian and, as is directed under the Amended Deposition Protocol (*see id.*), stated its intention to notify FHFA should additional documents be identified pursuant to the ongoing review required by various recent Court orders. RBS is complying in all respects with the protocol.

FHFA’s request for a presumptive “additional half-day of testimony in which to examine RBS witnesses regarding any Witness Documents produced fewer than 10 days before the deposition” (CT Dkt. 468-1; *Nomura* Dkt. 818) is completely unfair and unwarranted. FHFA premised its failure to notice depositions of RBS witnesses until more than nine months after the expiration of fact discovery in the *Nomura* Action on the notion that depositions should not be taken more than once in the consolidated actions. (*See Nomura* Dkt. 774.) And when it applied to Judge Cote for an after-the-fact extension of its deadline to file a summary judgment motion to allow for such depositions, FHFA said that it was ready to proceed with depositions based on the documents produced without the need to wait for Judge Thompson’s rulings on the then-pending motions. (*See id.*) Now, FHFA asks for the right to take a second deposition if the documents it said it did not need in order to take the depositions under the “one deposition rule” are not all produced ten days or more before the witness is to be deposed.⁵

FHFA’s application stands in stark contrast to the positions it took in the coordinated actions in the Southern District of New York (the “SDNY Actions”). FHFA did not represent that it completed its production in the Connecticut Action until June 21, 2013—after defendants, including RBS, had been required to depose eight plaintiff witnesses. (*See* CT Dkt. 431 at Ex. 2 at ¶ 4; *Nomura* Dkt. 789 at ¶ 4.) Moreover, FHFA refused to certify that it had produced all Witness Documents relating to RBS the day before the deposition of a former Fannie Mae employee, Lin Cao, and also refused to agree to make Ms. Cao available for additional deposition testimony after its Connecticut Action production was complete. Particularly in light of FHFA’s own actions in the SDNY Actions, FHFA should not be permitted any additional deposition days.

Quite simply, FHFA is making unreasonable demands in relation to the *Nomura* Action which it knows cannot be met, in order to obtain an unfair and unwarranted advantage in the Connecticut Action. Such gamesmanship should no longer be countenanced. For the reasons set forth above and in its other recent submissions,⁶ RBS respectfully requests that the relief FHFA requests be denied, and that FHFA be directed to meet and confer with RBS in good faith on the deposition and document production schedules.

⁵ If FHFA felt it needed an exemption to the single deposition rule to permit it to timely take depositions in the *Nomura* Action, it could have—and should have—asked Judge Thompson for such an exception, as permitted by the Coordination Order. FHFA should not now be able to subject RBS witnesses to multiple depositions.

⁶ *See Nomura* Dkt. 775; CT Dkt. 442-1; *Nomura* Dkt. 803; CT Dkt. 438-1; *Nomura* Dkt. 800; CT Dkt. 457; *Nomura* Dkt. 810; CT Dkt. 431-1; *Nomura* Dkt. 788.

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Respectfully,

/s/ Thomas C. Rice

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Telephone: (212) 455-2000
trice@stblaw.com

Attorneys for the RBS Defendants

EXHIBIT A

From: Waldman, Craig S
Sent: Wednesday, September 17, 2014 12:19 PM
To: Jordan Goldstein
Cc: Nester, Minta; Marina Olevsky; Leron Thumim
Subject: RE: FHFA/RBS Litigations

Jordan and Leron,

RBS will submit a response to FHFA's submission last night on deposition scheduling. In the meantime, we have worked with the witnesses and their counsel to provide the following potential compromise schedule that accommodates your request to shift Mr. Camacho to after the proposed October 1-2 dates:

- Frank Camacho: October 9-10. (Los Angeles.)
- Brian Farrell: October 29-30.
- William Gallagher: October 23-24.
- Scott Gimpel: October 9-10.
- Paul Goudie: October 16-17.
- Ann Marie Petrovcik: October 22-23.
- Frank Skibo: October 1-2 OR October 29-30.
- Adam Smith: October 21-22.
- James Whittemore: October 16-17.

As you see above, RBS can also agree to your request to move Mr. Skibo, if the parties can agree on consent, to the week that Mr. Farrell will be deposed.

Please let us know if this proposed compromise schedule is acceptable.

Regards,

Craig

From: Leron Thumim [mailto:LeronThumim@quinnemanuel.com]
Sent: Friday, September 12, 2014 6:23 PM
To: Nester, Minta; Waldman, Craig S; Jordan Goldstein
Cc: Marina Olevsky
Subject: RE: FHFA/RBS Litigations

Minta,

Will Mr. Camacho and/or Mr. Skibo be available at any time after October 6? The October 1-2 dates offered for their depositions are too close to the September 30 document production deadline set by the Courts.

Also, please confirm that the "estimate of the number of responsive, non-privileged documents that will be produced for each custodian" that you sent us earlier today is your good faith estimate of the remaining "Witness Documents" (as defined in the Deposition Protocol) to be produced.

Best,

- Leron

Leron Thumim

Associate,

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From: Nester, Minta [<mailto:MNester@stblaw.com>]

Sent: Friday, September 12, 2014 4:54 PM

To: Leron Thumim; Waldman, Craig S; Jordan Goldstein

Cc: Marina Olevsky

Subject: RE: FHFA/RBS Litigations

Leron,

Would November 20 be possible for Mr. McGinnis's deposition? Also, with regard to the scheduling changes you requested in connection with the depositions of Mr. Camacho, Mr. Skibo, and Ms. Petrovcik, but do not believe that they are feasible given the witnesses' schedules.

Regards,

Minta

Minta Nester

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mnester@stblaw.com

From: Leron Thumim [<mailto:LeronThumim@quinnemanuel.com>]

Sent: Friday, September 12, 2014 1:05 PM

To: Nester, Minta; Waldman, Craig S; Jordan Goldstein

Cc: Marina Olevsky

Subject: RE: FHFA/RBS Litigations

Minta,

We can confirm November 21 in New York for Mr. McGinnis's deposition. Are you able to provide an update re dates for the depositions of Mr. Camacho, Mr. Skibo, and Ms. Petrovcik?

Best,
- Leron

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From: Nester, Minta [<mailto:MNester@stblaw.com>]
Sent: Friday, September 12, 2014 12:50 PM
To: Leron Thumim; Waldman, Craig S; Jordan Goldstein
Cc: Marina Olevsky
Subject: RE: FHFA/RBS Litigations

Leron,

I apologize: I meant November 20 or 21.

Regards,
Minta

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From: Nester, Minta
Sent: Friday, September 12, 2014 12:35 PM
To: 'Leron Thumim'; Waldman, Craig S; Jordan Goldstein
Cc: Marina Olevsky
Subject: RE: FHFA/RBS Litigations

Leron,

Mr. McGinnis lives in Florida. If you would like him to be made available in New York, we propose either October 20 or October 21. This is, of course, subject to confirmation with the witness, but we wanted to know whether that week would be feasible.

Regards,
Minta

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From: Leron Thumim [<mailto:LeronThumim@quinnemanuel.com>]
Sent: Thursday, September 11, 2014 2:34 PM
To: Waldman, Craig S; Jordan Goldstein
Cc: Nester, Minta; Marina Olevsky
Subject: RE: FHFA/RBS Litigations

Craig,

Thank you for providing deposition dates for Mr. Smith. We expect to be able cover those.

With respect to Ms. Petrovcik's deposition, we are okay either moving her to 10/6-10/7 or 10/7-10/8, as well as after 10/21.

Thank you,
- Leron

From: Waldman, Craig S [<mailto:CWaldman@stblaw.com>]
Sent: Thursday, September 11, 2014 2:09 PM
To: Leron Thumim; Jordan Goldstein
Cc: Nester, Minta; Marina Olevsky
Subject: RE: FHFA/RBS Litigations

We've just heard from Adam Smith that he can offer October 21-22. We'll look at the issues you raise below, but I know right off the top of my head that Ann Marie Petrovick cannot do the week before because of a conflict.

From: Leron Thumim [<mailto:LeronThumim@quinnemanuel.com>]
Sent: Thursday, September 11, 2014 1:50 PM
To: Jordan Goldstein; Waldman, Craig S
Cc: Nester, Minta; Marina Olevsky
Subject: RE: FHFA/RBS Litigations

Craig,

A few of the dates offered do not work for us:

- Is Mr. Camacho available (in LA) during the week of 10/20?
- Is Mr. Skibo available on or after 10/6?
- Is Ms. Petrovcik available earlier in the week of 10/6? The offered dates appear not to work due to conflict with a Jewish holiday.

Further, under Section II.E of the Amended Deposition Protocol ordered by Judge Thompson on September 30, 2013 (Dkt. 189), you must provide us with a good faith estimate of the volume of "Witness Documents" (as defined in the protocol) remaining to be produced for each deponent. Please do so by close-of-business tomorrow. Please also confirm by close of business tomorrow that production of Witness Documents for all noticed deponents will be complete by September 30, 2014.

Thank you,
- Leron

From: Jordan Goldstein
Sent: Thursday, September 11, 2014 10:33 AM
To: Waldman, Craig S
Cc: Nester, Minta; Leron Thumim
Subject: RE: FHFA/RBS Litigations

Please let us know by 3 PM. Thanks.

From: Waldman, Craig S [<mailto:CWaldman@stblaw.com>]
Sent: Thursday, September 11, 2014 10:22 AM
To: Jordan Goldstein
Cc: Nester, Minta; Leron Thumim
Subject: RE: FHFA/RBS Litigations

Copying in Leron, who I always forget to add to this chain.

From: Waldman, Craig S
Sent: Thursday, September 11, 2014 10:16 AM
To: 'Jordan Goldstein'
Cc: Nester, Minta
Subject: RE: FHFA/RBS Litigations

Adam Smith just got in touch with RBS to say he's retaining counsel and that he'll be able to provide dates by mid-day tomorrow. So, if you are willing to hold off on a subpoena for now, we should have dates for him shortly. Let me know.

From: Waldman, Craig S
Sent: Wednesday, September 10, 2014 5:43 PM
To: 'Jordan Goldstein'
Cc: Nester, Minta
Subject: RE: FHFA/RBS Litigations

Camacho date is confirmed for LA.

From: Waldman, Craig S
Sent: Wednesday, September 10, 2014 2:55 PM
To: 'Jordan Goldstein'

Cc: Nester, Minta

Subject: RE: FHFA/RBS Litigations

Jordan,

Here are proposed dates for the diligence depositions which, as discussed, are all within the October 1st to October 24th window except for Brian Farrell:

- Frank Camacho: [October 1-2.] (Los Angeles. Subject to confirmation today.)
- Brian Farrell: October 29-30.
- William Gallagher: October 23-24.
- Scott Gimpel: October 9-10.
- Paul Goudie: October 16-17.
- Ann Marie Petrovcik: October 8-9.
- Frank Skibo: October 1-2.
- Adam Smith: No dates.
- James Whittemore: October 16-17. (Willing to travel here from Chicago for deposition.)

You will need to subpoena Adam Smith. Talk to you at 3:00 p.m.

Regards,

Craig

From: Jordan Goldstein [<mailto:jordangoldstein@quinnemanuel.com>]

Sent: Monday, September 08, 2014 7:07 PM

To: Waldman, Craig S; Cohen, Evan I

Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta; RBS Team - FHFA

Subject: RE: FHFA/RBS Litigations

We will speak with you tomorrow and Wednesday at 2 PM – please use the same conference dial-in for both calls.

Regards,

Jordan

From: Waldman, Craig S [<mailto:CWaldman@stblaw.com>]

Sent: Monday, September 08, 2014 7:03 PM

To: Jordan Goldstein; Cohen, Evan I

Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta; RBS Team - FHFA

Subject: RE: FHFA/RBS Litigations

Jordan,

Both the Tuesday and Wednesday times are OK for us. As we told you during one of last week's meet and confers, if you are not able to take Brian Farrell's deposition on the already proposed September 17th and 18th dates, his deposition will need to be scheduled for the end of October or beginning of November because of his wife's pregnancy.

Regards,

Craig

From: Jordan Goldstein [<mailto:jordangoldstein@quinnemanuel.com>]
Sent: Monday, September 08, 2014 6:35 PM
To: Waldman, Craig S; Cohen, Evan I
Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta; RBS Team - FHFA
Subject: RE: FHFA/RBS Litigations

Craig,

With respect to the scheduling of depositions, let's speak at 2 PM on Wednesday. In addition, in light of the Courts' recent orders setting September 30, 2014, as RBS's production deadline for many of its remaining discovery obligations, including as to diligence materials, please propose deposition dates between October 1 and 24, 2014, for all nine due diligence depositions. Please use the following dial-in: 866-499-9580, passcode: 5904058.

With respect to the parties' submission on the production of documents from the five new RBS custodians, which is due on Wednesday, we should speak tomorrow. Does 2 PM Tuesday work?

Regards,

Jordan

From: Waldman, Craig S [<mailto:CWaldman@stblaw.com>]
Sent: Monday, September 08, 2014 6:17 PM
To: Jordan Goldstein; Cohen, Evan I; Sascha Rand; Adam Abensohn; Marina Olevsky
Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta
Subject: RE: FHFA/RBS Litigations

Jordan,

We received several orders today that impact deposition scheduling for these nine witnesses including an order that gives the parties until October 24th to complete these depositions, which is longer than the parties had previously been given. Rather than having us give dates and then switching those dates to accommodate the extra week of time, we are endeavoring today and tomorrow to work with the witnesses (most of whom are former employees) and their counsel to provide realistic dates within the expanded timeframe. We'd request that you accommodate that process.

Regards,

Craig

From: Jordan Goldstein [<mailto:jordangoldstein@quinnemanuel.com>]
Sent: Monday, September 08, 2014 6:11 PM
To: Cohen, Evan I; Waldman, Craig S; Sascha Rand; Adam Abensohn; Marina Olevsky
Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta
Subject: RE: FHFA/RBS Litigations

Even,

Marina has already responded to you with regard to the meet-and-confer ordered by Judges Thompson and Judge Cote, which should occur tomorrow, as the parties' submission to the Courts is due Wednesday.

With regard to the proposed dates for depositions we have noticed, RBS is required to provide that information today. You have not cited any basis that would excuse RBS's compliance with Section 2.E. of the Amended Deposition Protocol.

From: Cohen, Evan I [<mailto:ECohen@stblaw.com>]

Sent: Monday, September 08, 2014 3:24 PM

To: Waldman, Craig S; Jordan Goldstein; Sascha Rand; Adam Abensohn; Marina Olevsky

Cc: Rice, Thomas; Woll, David; Frankel, Andy T; Turner, Alan; Nester, Minta

Subject: FHFA/RBS Litigations

The order issued today by Judge Thompson and Judge Cote requires us to meet and confer regarding document discovery. Please let us know if you are available to meet and confer Wednesday afternoon between 2:00 p.m. and 5:00 p.m. We will be providing proposed dates for the depositions you have previously noticed on Wednesday.

Regards,

Evan

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